Medical Office Management Corporation Block v Parkway Life Malaysia Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCVC-174–04 OF 2014
S M KOMATHY JC
19 NOVEMBER 2014

Civil Procedure — Limitation — Claim for management charges owned by previous owner — Whether claim barred by limitation — Whether debt became payable only when management corporation had knowledge of claim

Civil Procedure — Preliminary issue of law — Issue decided by way of O 14A application — Whether plaintiff's claim barred under s 6 Limitation Act 1953 — Whether management corporation entitled to recover amount exceeding the total contributions to the management fund — Whether management corporation entitled to charge any amount for period prior to its establishment

Land Law — Strata title — Maintenance charges — Non-payment of — Claim for management charges owned by previous owner — Whether claim barred by limitation — Whether management corporation entitled to recover amount exceeding the total contributions to the management fund — Whether attempt to levy charges over and above 'maintenance charges' was in contravention of ss 41(5)(ba) and 45 of Strata Titles Act 1985 — Whether management corporation entitled to charge any amount for period prior to its establishment — Strata Titles Act 1985 ss 41(5)(ba) & 45(5)

Land Law — Strata title — Management corporation — Charges imposed by management corporation on unit owner — Whether management corporation empowered to recover amount exceeding the total contributions to the management fund — Whether attempt to levy charges over and above the 'maintenance charges' in contravention of ss 41(5)(ba) and 45 of Strata Titles Act 1985 — Whether management corporation entitled to charge any amount for period prior to its establishment — Strata Titles Act 1985 ss 41(5)(ba) & 45(5)

The defendant purchased the whole of the eighth floor within an office complex on 1 August 2012. The management corporation subsequently discovered that the previous owner from whom the defendant had purchased the said property had not settled in full some charges levied on it. In this action, the management corporation, sought to recover these charges from the defendant which included, service charges, quit rent, electricity and insurance

premiums, amounting to RM1,810,304.71. The plaintiff's claim was predicated on s 45(5) of the Strata Titles Act 1985 ('the Act'). The charges which the plaintiff sought to recover against the defendant accrued between August 1996 to September 2009/May 2010. The plaintiff commenced this action against the defendant on 11 April 2014. The defendant contended that the plaintiff's claim for the period prior to 11 April 2008 was barred by limitation. The plaintiff took the position that the debt became payable only when it had knowledge of the claim. The existence of the debt was only discovered on 30 September 2009, when it took over the management fund at the First Annual General Meeting when the office bearers were elected. The plaintiff held its annual general meeting on 30 September 2009. On that date, a council was elected and contributions to the management fund set at the rate of 50 cent per square foot. From that date henceforth, the plaintiff took over the management of the common property. The defendant claimed that some of the charges claimed in this action were not levied by the plaintiff, but had been levied by the earlier developer. The defendant applied pursuant to O 14A of the Rules of Court 2012 to determine the following questions of law: (a) whether the plaintiff's claim against the defendant for the period prior to 11 April 2008 was barred under s 6 of the Limitation Act 1953 because the claim arose more than six years prior to the date filing of the plaintiff's claim against the defendant?; (b) whether the plaintiff was entitled to recover from the defendant the amount of RM876,453.01 which was over and above and or exceed the total contributions to the management fund under the provisions of the Act?; and (c) whether the plaintiff was entitled to charge and or recover any amount for the period prior to its establishment as management corporation ie before 1 November 2006?

Held:

(1) All claims arising prior to 11 April 2008 were barred by limitation. The fact that it was only in October 2009 the plaintiff had discovered the shortfall did not postpone the cause of action. Hence, question 1 was answered in the affirmative (see paras 12–13); *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749 referred.

(2) Section 45 of the Act empowers a management corporation to establish and manage a fund which is sufficient to meet administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance. Be that as it may, there was no basis for the plaintiff to separately charge for electricity, fire insurance, and quit rent apart from the charges for maintenance fee. Under the Act, the plaintiff was only entitled to levy one charge which is limited to 'contributions to the management fund' and nothing more. In that sense, payment for electricity, fire insurance and quit rent should be payable by the plaintiff by utilising the 'contributions' to the maintenance fund ie the

maintenance fee collected from each parcel proprietor and not by imposing further charges to the parcel proprietors. Thus, the plaintiff could not claim for any sum which exceeded the 'service charges' or in this case the 'maintenance charges'. Any attempt to levy charges over and above the 'maintenance charges' was in contravention of ss 41(5)(ba) and 45 of the Act since the law only allows the levying of one payment and out of that payment, a portion would be contributed to the 'special account'. The plaintiff, as a creature of statute, could only levy payments which were mandated by statute. Hence, question 2 was answered in the negative (see paras 16–17 & 23); *Pengurusan Perbadanan Endah Parade v Magnificient Diagraph Sdn Bhd* [2013] 6 MLJ 343 referred.

(3) The management corporation as the successor in title to the developer is entitled to recover from the parcel proprietors unpaid service charges that were imposed by the developer. Whilst it is true that under the Strata Titles Act, there is no express provision for the management corporation to recover charges levied by its predecessor in title, the management corporation as the successor in title to the developer, is entitled in law to recover these charges. Hence, question 3 was answered in the affirmative (see paras 27–28).

[Bahasa Malaysia summary

Defendan membeli keseluruhan tingkat lapan dalam kompleks pejabat pada 1 Ogos 2012. Pengurusan perbadanan kemudian telah mendapati bahawa pemilik sebelumnya yang mana defendan telah membeli hartanah tersebut itu tidak menyelesaikan sepenuhnya beberapa caj yang dikenakan ke atasnya. Dalam tindakan ini, pengurusan perbadanan, memohon untuk mendapat balik caj-caj tersebut daripada defendan yang termasuk, caj-caj perkhidmatan, cukai pintu, elektrik dan premium insurans, yang berjumlah RM1,810,304.71. Tuntutan plaintif adalah berdasarkan s 45(5) Akta Hak Strata 1985 ('Akta tersebut'). Caj-caj yang dipohon oleh plaintif untuk mendapat balik daripada defendan terakru antara bulan Ogos 1996 hingga September 2009/Mei 2010. Plaintif telah memulakan tindakan ini terhadap defendan pada 11 April 2014. Defendan telah berhujah bahawa tuntutan plaintif untuk tempoh sebelum 11 April 2008 telah dihalang oleh had masa. Plaintif mengambil kedudukan bahawa hutang itu menjadi boleh dibayar hanya apabila ia menjadi kena dibayar hanya apabila ia mempunyai pengetahuan tentang tuntutan itu. Kewujudan hutang itu hanya disedari pada 30 September 2009, apabila ia mengambil alih dana pengurusan pada Mesyuarat Agung Tahunan Pertama apabila pemegang jawatan dilantik. Plaintif mengadakan mesyuarat agung tahunannya pada 30 September 2009. Pada tarikh tersebut, satu majlis mesyuarat telah dilantik dan sumbangan kepada dana pengurusan ditetapkan pada kadar 50 sen sekaki persegi. Daripada tarikh itu, plaintif telah mengambil alih pengurusan harta bersama. Defendan mendakwa bahawa beberapa caj yang dituntut dalam tindakan ini

tidak dikenakan oleh plaintif, tetapi telah dikenakan oleh pemaju sebelumnya. Defendan telah memohon menurut A 14A Kaedah-Kaedah Mahkamah 2012 untuk menentukan persoalan-persoalan undang-undang berikut: (a) sama ada tuntutan plaintif terhadap defendan untuk tempoh sebelum 11 April 2008 dihalang di bawah s 6 Akta Had Masa 1954 kerana tuntutan itu timbul lebh daripada enam tahun sebelum tarikh pemfailan tuntutan plaintif terhadap defendan?; (b) sama ada plaintif berhak untuk mendapatkan semula daripada defendan jumlah RM876,453.01 yang melebihi dan/atau melampaui jumlah sumbangan kepada dana pengurusan di bawah peruntukan Akta tersebut?; dan (c) sama ada plaintif berhak untuk mengenakan caj dan/atau mendapatkan semula apa-apa jumlah untuk tempoh sebelum penubuhannya sebagai pengurusan perbadanan iaitu sebelum 1 November 2006?

Diputuskan:

(1) Semua tuntutan yang timbul sebelum 11 April 2008 telah dihalang oleh had masa. Fakta bahawa hanya pada bulan Oktober 2009 plaintif menyedari tentang kekurangan itu tidak menangguhkan kausa tindakan. Justeru, persoalan 1 dijawab secara positif (lihat perenggan 12 & 13); *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749 dirujuk.

(2) Seksyen 45 Akta tersebut memberi kuasa kepada pengurusan perbadanan untuk menubuh dan menguruskan dana yang mencukupi bagi memenuhi perbelanjaan pentadbiran yang mungkin ditanggung bagi tujuan mengawal, mengurus dan mentadbir harta bersama, membayar sewa, kadar dan premium insurans. Oleh demikian, tiada asas untuk plaintif mengenakan caj berasingan bagi elektrik, insurans kebakaran, dan cukai pintu selain daripada caj untuk fi penyelenggaraan. Di bawah Akta tersebut, plaintif hanya berhak untuk levi satu caj yang terhad kepada 'contributions to the management fund' dan tidak lebih daripada itu. Dalam erti kata tersebut, bayaran untuk elektrik, insurans kebakaran dan cukai pintu hendaklah kena dibayar oleh plaintif dengan menggunakan 'sumbangan' kepada dana pengurusan iaitu fi pengurusan yang dikutip daripada setiap pemilik petak dan bukan dengan mengenakan caj selanjutnya kepada pemilik-pemilik petak itu. Oleh itu, plaintif tidak boleh menuntut untuk apa-apa jumlah yang melebihi 'service charges' atau dalam kes ini 'maintenance charges'. Apa-apa percubaan untuk mengenakan caj-caj yang melebihi caj levi melebihi 'maintenance charges' adalah bertentangan dengan ss 41(5)(ba) dan 45 Akta tersebut kerana undang-undang hanya membenarkan mengenakan levi untuk satu bayaran dan daripada bayaran itu, sebahagiannya akan disumbang kepada 'special account'. Plaintif, sebagai alat statut, hanya boleh mengenakan bayaran yang diwajibkan oleh statut. Justeru, persoalan 2 dijawab secara negatif (lihat perenggan 16–17 & 23); *Perbadanan Pengurusan Endah Parade v Magnificient Diagraph Sdn Bhd* [2013] 6 MLJ 343 dirujuk.

(3) Perbadanan pengurusan sebagai pengganti hakmilik kepada pemaju adalah berhak untuk mendapatkan semula daripada pemilik petak caj-caj perkhidmatan yang tidak dibayar yang telah dikenakan oleh pemaju. Sementara ia adalah benar bahawa di bawah Akta Hakmilik Strata, tidak ada peruntukan nyata untuk perbadanan pengurusan mendapatkan semula caj-caj yang dikenakan oleh pendahulunya hakmilik, perbadanan pengurusan sebagai pengganti hakmilik kepada pemaju, berhak daripada segi undang-undang untuk mendapat balik caj-caj tersebut. Justeru, persoalan 3 dijawab secara positif (lihat perenggan 27–28).]]]]

Notes

For cases on maintenance charges, see 8 *Mallal's Digest* (5th Ed, 2015) paras 5528–5533

For cases on management corporation, see 8 *Mallal's Digest* (5th Ed, 2015) paras 5534–5552

Cases referred to

Perbadanan Pengurusan Endah Parade v Magnificient Diagraph Sdn Bhd [2013] 6 MLJ 343, CA (refd)

Tenaga Nasional Bhd v Kamarstone Sdn Bhd [2014] 2 MLJ 749, FC (refd)

Legislation referred to

Limitation Act 1953 ss 6, 29

Rules of Court 2012 O 14A

Strata Titles Act 1985 ss 41, 43(2), 45, 45(5), 52, 53

Mark M Raman (M Raman & Assoc) for the plaintiff.

Andrew Teh (Daphne Koo and Kwong Chiew Ee with him) (Rahmat Lim & Partners) for the defendant.

SM Komathy JC:

INTRODUCTION

[1] The defendant purchased the whole of the 8th floor within an office complex on 1 August 2012. The management corporation subsequently discovered that the previous owner from whom the defendant had purchased the said property had not settled in full some charges levied on it. In this action, the management corporation, seeks to recover these charges from the defendant which included, service charges, quit rent, electricity and insurance premiums, amounting to RM1,810,304.71.

[2] The plaintiff's claim against the defendant is predicated on s 45(5) of the Strata Titles Act 1985 which renders the new owner statutorily liable for any unpaid charges of the previous owner as the successor in title. It provides:

Any contribution levied under subsection (3) in respect of a parcel shall be due and payable on the passing of a resolution to that effect by the management corporation and in accordance with the terms of that resolution, and may be recovered as a debt from a proprietor of, or his successor in title to, the parcel.

THE APPLICATION

[3] This is the defendant's application pursuant to O 14A of the Rules of Court 2012 to determine questions of law arising from the plaintiff's pleaded case against it based on a statement of agreed facts in support of the application as set out at para [5].

[4] The three questions framed for the court's determination are as follows:

(a) whether the plaintiff's claim against the defendant for the period prior to 11 April 2008 is barred under s 6 of the Limitation Act 1953 because the claim arose more than six years prior to the date filing of the plaintiff's claim against the defendant? ;

(b) whether the plaintiff is entitled to recover from the defendant the amount of RM876.453.01 which is over and above and or exceed the total contributions to the management fund under the provisions of the Strata Titles Act 1985?; and

(c) whether the plaintiff is entitled to charge and or recover any amount for the period prior to its establishment as management corporation ie before 1 November 2006?

STATEMENT OF AGREED FACTS

[5] The statement of agreed facts filed by the parties was in these terms:

(a) the plaintiff, Perbadanan Pengurusan Medical Office Block, is a management corporation of a development project known as 'Medical Office Block' which has an address at No 282, Jalan Ampang, 50450 Kuala Lumpur, and was incorporated under the Strata Titles Act 1985;

(b) the plaintiff was incorporated on 1 November 2006, and the management of 'Medical Office Block' was only handed over to the plaintiff on 30 September 2009;

(c) the defendant had purchased the defendant's unit from Gleneagles Medical Centre (Kuala Lumpur) Sdn Bhd ('Gleneagles') and had since 1 August 2012 became the registered owner of the whole 8th floor and the accessory parcels in the Medical Office Block ('defendant's Unit');

(d) at a material times, Gleneagles was also the developer of Medical Office Block;

(e) the defendant had vide a letter from its solicitors dated 12 July 2012 to the plaintiff enquired whether there was any outstanding sum that is due and payable in respect of the defendant's unit;

(f) the plaintiff vide its solicitors replied in a letter dated 3 August and informed the defendant that there were some outstanding sums that Gleneagles had to pay to the plaintiff, and at the same time, requested for a copy of the sale and purchase agreement between the defendant and Gleneagles;

(g) the defendant replied vide letter dated 22 August 2012 and stated that the defendant is not liable to pay the outstanding sum claimed by the plaintiff, and that there was no necessity for the defendant to provide the plaintiff a copy of the sale and purchase agreement between the defendant and Gleneagles as the plaintiff was not party to the said agreement; and

(h) on 3 February, the plaintiff through a letter from its solicitors demanded from the defendant as the registered owner to pay the outstanding sums for all charges.

[6] I now turn to consider the three questions of law framed for my consideration.

Question 1:

Whether the plaintiffs claim against the defendant for the period prior to 11 April 2008 is barred under s 6 of the Limitation Act 1953 because the claim arose more than six years prior to the date of filing of the plaintiffs claim against the defendant?

[7] It is common ground that the charges which the plaintiff seeks to recover in this action against the defendant accrued between August 1996 to September 2009/May 2010. The plaintiff commenced this action against the defendant on 11 April 2014

[8] The defendant contended that the plaintiff's claim for the period prior to 11 April 2008 was barred by limitation as the cause of action arose when the debt became payable. On the other hand, the plaintiff took the position that the debt became payable only when it had knowledge of the claim. The existence of the debt was only discovered on 30 September 2009, when it took over the management fund at the first annual general meeting when the office bearers were elected.

[9] In view of the rival submissions, it is instructive to refer to the recent decision of the Federal Court in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749, pertaining to the law on limitation in relation to claims founded on contract. There, the respondent entered into a contract with the appellant on 15 August 1996 for the latter to supply it electricity. In January 2003, the appellant discovered it had undercharged the respondent by in relation to electricity supplied from October 1996 until October 2002. On 13 January 2003 the appellant demanded that the respondent settle the shortfall. On 15 September 2003, the respondent appealed for the shortfall to be reduced. The appellant rejected the appeal and filed action to recover the shortfall on 26 October 2005.

[10] The High Court dismissed the claim on the ground thats 29 of the Limitation Act 1953 applied to postpone the running of time until the appellant discovered the 'mistake' in computation in January 2003. On appeal, the decision was confirmed by the Court of Appeal.

[11] The Federal Court, rejected the appellant's contention that the breach occurred when it discovered the 'mistake' in computation and ruled that the cause of action arose when the debt became payable. In delivering the judgment of the Federal Court, Jeffry Tan FCJ observed:

> [12] ... In *Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 at p 19, the Supreme Court per Salleh Abbas CJ, expounded that to make up 'a cause of action'. first, the plaintiff has a right at law or by statue and secondly, the right has been affected by the act of the defendant:
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> > A cause of action is a statement of facts alleging that a plaintiffs right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. *Lord Diplock in Letang v Cooper H* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.
>
> [17] And *Nasri v Mesah*, we observe, is still good law (see the Federal Court cases of *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1984] 2 MLJ 280, *Insun Development Sdn Bhd v Azali bin Bakar* [1996] 2 MLJ 188, and *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209, which followed *Nasri v Mesah*) which we readily endorse. A cause of action founded on a contract accrues on the date of its breach, and in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action.
>
> [18] Between October 1996 and October 2002 the appellant had a right, albeit undiscovered, to the shortfall, which was a debt due from the respondent. Except

that the shortfall was not discovered until years later, in January 2003. Nevertheless, it remained that between October 1996 and October 2002, the appellant was paid less than the sum calculated on the correct multiplier. The shortfall was incurred during that period. 'In a contract for the payment of money the breach occurs when there is a failure to pay the sum promised. This is logical as the meaning of 'cause of action' is the act on the part of the defendant which gives the plaintiff his cause of complaint' (see *Jackson v Spittall* (1870) LR 5 CP 542). The failure to pay will be the cause of complaint (*Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 at p 127, per Augustine Paul J, as he then was). The shortfall was the result of short payment. Since the shortfall was incurred during that period, it should follow that the short payment was occasioned during that period. If action had been taken then, that is, when the shortfall occurred, the facts were already in existence, albeit unknown, which would have entitled the appellant to succeed. Clearly, therefore, between October 1996 and October 2002, the appellant had a cause of action.

And in the instant case, the time when the shortfall could first have been recovered would have been when the shortfall was incurred. We therefore agree that breach was occasioned between October 1996 and October 2002, when there was no cap on any retrospective adjustment of undercharge.

[12] Applying the principle in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* to the instant facts, it is clear that the all claims arising prior to 11 April 2008 are therefore barred by limitation. The fact that it was only in October 2009 the plaintiff had discovered that Gleneagles had not been paying the full sum into the management fund , does not postpone the cause of action.

[13] In the result, I answer question 1 in the affirmative.

Question 2:

Whether the plaintiff is entitled to recover from the defendant the amount of RM876,453.01 which is over and above and or exceeds the total contributions to the management fund under the provisions of the Strata Titles Act 1985?

[14] The plaintiff's claim against the defendant can be broken down as follows:

Maintenance fee and sinking fund	=	RM933,851.70
Electricity	=	RM745,000.00
Fire Insurance	=	RM95,367.87
Quit Rent	=	RM36,085.14
TOTAL	=	RM1,810,304.71

[15] It is common ground that the plaintiff as the management corporation for MOB is established pursuant to the Strata Titles Act and as a creature of statute derives its legal existence , powers and duties pursuant and subject to the said Act. It is empowered to only levy payments which are mandated by the Act.

[16] The defendant's submissions on question 2 are outlined in its written submission and are as follows :

6.3 Section 45 Strata Titles Act 1985 empowers a management corporation to establish and manage a fund which is sufficient to meet administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance.

6.4 Be that as it may, there is no basis for the plaintiff to separately charge for electricity, fire insurance, and quit rent apart from the charges for maintenance fee. Under the Strata Titles Act 1985, the plaintiff is only entitled to levy one charge which is limited to 'contributions to the management fund' and nothing more.

6.5 In that sense, payment for electricity, fire insurance and quit rent should be payable by the plaintiff by utilising the 'contributions' to the maintenance fund i.e. the maintenance fee collected from each parcel proprietor and not by imposing further charges to the parcel proprietors.

6.6 Thus, the plaintiff cannot claim for any sum which exceeds the 'service charges' or in this case the 'maintenance charges'. Any attempt to levy charges over and above the 'maintenance charges' is in contravention of ss 41(5)(ba) and 45 Strata Title Act 1985 since the law only allows the levying of one payment and out of that payment, a portion would be contributed to the 'special account'. The plaintiff, as a creature of statute, can only levy payments which are mandated by statute.

6.7 It is submitted that the plaintiffs claim in relation to the sum of RM876,453.01 (being the total sum claimed separately by plaintiff for electricity, fire insurance and quit rent, ie RM745,000.00 + RM95,367.87 + RM36,085.14) is over and above and or exceeds the total amount payable as contribution to the management fund. This claim cannot be sustained as it will be ultra vires its powers for the plaintiff to levy payments which are not sanctioned by statute.

6.8 The defendant is only obligated to pay as successor in title any contributions to the management fund which is legally due and outstanding by the previous owner, if any, provided the plaintiff is unable to recover the same from the previous owner.

[17] In support of this proposition, the defendant referred to the decision of the Court of Appeal in *Perbadanan Pengurusan Endah Parade v Magnificient Diagraph Sdn Bhd* [2013] 6 MLJ 343 ('Endah Parade'). A

[18] In response, the plaintiff disputed the contention put forward by the defendant that the Strata Titles Act did not permit a management corporation to recover charges over and above 'maintenance or service charges'. It was submitted that the said Act expressly permitted a management corporation to claim quit rent and insurance premiums from the owners. No cases were cited by the plaintiff on what is the proper interpretation of the provisions in the Strata Titles Act. B C

[19] At this juncture, it is appropriate to refer to the case of *Endah Parade* where this issue has been most recently and authoritatively discussed in the judgment of Mohamad Ariff JCA. There, the management corporation of a commercial and shopping complex brought an action against a proprietor of two strata title parcels within the complex to claim for the following items: signage charges, administrative charges for water meter reading, electricity charges for extended hours, fire insurance, legal fees, cleaning charges for water and oil, quit rent, sinking fund, service charges, sewerage charges (fixed), sewerage charges (consumption) and water charges. These charges had been levied on the parcel proprietor by the management corporation pursuant to the Strata Titles Act. D E

[20] At the conclusion of the trial, the High Court only allowed the claims for signage charges, electricity for extended hours and service charges on the basis that the management corporation was not empowered to levy the other charges on the unit owners. All other claims were consequently dismissed. The management corporation appealed against the decision. On appeal, the decision was affirmed and the appeal dismissed. The following passages (at paras 35–37) in the judgment of Mohamad Ariff JCA merit reproduction; His Lordship observed : F G

> In terms of statutory context, the proprietors of a subdivided building have what is termed by the statute as 'share units entitlements' (s 36) which is taken to be the 'value' of each parcel. That 'value' shall, inter alia, determine 'the proportion payable by each proprietor of the contribution levied by the management corporation pursuant to s 45 ...' (s 36(c)). It is quite plain that based on this formula each proprietor has to share the administrative and maintenance expenses, inclusive of insurance premiums, which are carefully defined and delineated by the several statutory provisions mentioned earlier above. On the facts, the premiums for the insurance taken have been approved at general meeting. It has to be emphasised again that the management corporation is under a statutory duty to insure the subdivided building. The issue here is not whether proprietors do not have to contribute towards the payments for insurance premiums, but whether they can be compelled to pay their share over and above the statutory contribution to the H I

Management Fund as established under s 45(1). In this respect, we agree with the proposition advanced by the respondent that the management corporation as a body incorporated under statute can only levy payments which are mandated by the statute. It will be ultra vires its powers for the management corporation to levy payments which are not sanctioned by the statute. This is where a proper interpretation of s 45 of the STA becomes of fundamental importance. Section 45(1) states very clearly that the management corporation 'shall establish a management fund sufficient in the opinion of the management corporation to meet the administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance and discharging any other obligation of the management corporation'. This is a very comprehensive provision. The expenses referred to includes the payment of 'premiums of insurance' and other payments connection with 'discharging any other obligation of the management corporation'. To this extent, we agree with the submission of counsel for the respondent that in fixing the contribution to be paid by each proprietor, the management corporation must budget for it for approval at general meeting. After all, s 45(3) allows the management corporation to 'determine from time to time the amount to be raised for the purposes mentioned in subsection (1), ie the contribution to the Management Fund'. The issue is not whether the management corporation should not be empowered to act reasonably or to deny that it should have discretion and flexibility to manage the sub-divided building in its day-to-day running, but rather whether the charges have been properly decided by the unit holders in general meeting. We have been referred to the High Court decision in *Lai King Lung v Perbadanan Pengurusan Anjung Hijau & Anor* [2012] 7 MLJ 680; [2012] 1 CLJ 1013, which in turn quotes the Singapore High Court decision in *Paganetto v Management Corp Strata Title No 1075* [1988] 1 SLR 268, and the general principle that a management corporation should be allowed to act reasonably without undue insistence on the existence of specific by-laws to cover every practical difficulty. We agree such an approach will be unreasonable and, to quote counsel for the appellant, 'at most ... highly technical and at its lowest ... pedantic'. Nevertheless, the issue of proper authority to impose a levy is too important to be left to the management corporation or the council to decide as a matter of discretion. It is not quite a matter such as deciding which contractor should mow the lawn.

The same reasoning applies in relation to the sinking fund. We find the statutory provision in s 46 of the STA quite clear. It states that the management corporation 'shall maintain the special account in which shall be paid such portion of the contribution to the management fund as may from time to time under paragraph (ba) of subsection (5) of section 41 by special resolution for the purposes of meeting its actual or expected liabilities' in respect of the several matters concerned with maintenance already alluded to earlier. The amount to be placed in the special account must be 'such portion of the contribution'. and therefore on a proper and purposive interpretation of this provision, the management corporation cannot impose an additional levy as sinking fund over and above the contribution to the management fund. We therefore agree with the decision of the learned trial judge on this issue.

We have considered the argument by counsel for the appellant that allegedly levies can be imposed under the by-laws. By-laws however are essentially subordinate

legislation. They cannot override the main provisions in ss 45 and 41 of the Act. Thus the argument that cl 4C of the deed of mutual covenants empowers the management corporation to impose 'all other charges which are properly chargeable' and that the appellant is merely claiming to recover these consumption expenses that it has paid on behalf of the unit holders, cannot stand in the face of clear statutory provisions in the main Act.

[21] The principle which I derive from the decision of the Court of Appeal is that the a management corporation is not empowered to levy charges which exceed the service charges by virtue of ss 45 and 41 of the Strata Titles Act. A management corporation is only empowered under the Strata Titles Act to levy one payment or contribution from the unit owners approved at general meeting.

[22] The decision in *Endah Parade* concludes the issue in the plaintiff's favour.

[23] I therefore answer question 2 in the negative.

Question 3:

Whether the plaintiff is entitled to charge and or recover any amount for the period prior to its establishment as MC ie before 1 November 2006?

[24] It is common ground that the plaintiff held its annual general meeting on 30 September 2009. On that date, a council was elected and contributions to the management fund set at the rate of 50 cent per square foot. From that date henceforth, the plaintiff took over the management of the common property of MOB.

[25] The defendant pointed out that some of the charges claimed in this action were not levied by the plaintiff, but had been levied by Gleneagles as the developer. Therefore, the plaintiff is not empowered to recover these charges in this action. Under the Strata Titles Act, it is only empowered to recover charges levied by it after its establishment. It this connection, the defendant referred to ss 43(2), 45 and 52. These provisions provide:

Section 43(2)

(2) The powers of the management corporation shall include the following:

(a) to recover from any parcel proprietor any sum expended by the management corporation in respect of that proprietor's parcel in complying with any such notices or orders as are referred to in paragraph (1)(h);

Section 45

(1) The management corporation shall establish a management fund sufficient in the opinion of the management corporation to meet the administrative expenses as may be incurred for the purposes of controlling, managing and administering the common property, paying rent, rates and premiums of insurance and discharging any other obligation of the management corporation.

(2) The management corporation may invest any moneys in the management fund, but only in such investments or in such manner as may be approved at a general meeting.

(3) Subject to section 41 A, for the purpose of establishing and maintaining the management fund the management corporation may at a general meeting –

(a) determine from time to time the amount to be raised for the purposes mentioned in subsection (1);

(b) raise the amounts so determined by levying contributions on the proprietors in proportion to the share units or provisional share units of their respective parcels or provisional blocks; and

[26] It was argued that the common thread that runs through all three provisions stated in s 53 is that the recovery is only permissible in respect of sums incurred, expended or levied by the management corporation.

[27] I disagree. In my judgment, the management corporation as the successor in title to the developer is entitled to recover from the parcel proprietors unpaid service charges that were imposed by the developer. Whilst it is true that under the Strata Titles Act, there is no express provision for the management corporation to recover charges levied by its predecessor in title, in my view, the management corporation as the successor in title to the developer, is entitled in law to recover these charges.

[28] In the result, question 3 is answered in the affirmative.

CONCLUSION

[29] Accordingly, the balance sum that the plaintiff is entitled to claim and litigate in this action is RM105,083. Costs of this O 14A application to be determined at the conclusion of the trial.

Order accordingly.

Reported by Kanesh Sundrum